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NO. 84-1663

In The

Supreme Court of the United States

OCTOBER TERM, 1985

Leara Denson, *Petitioner*

v.

Department of Health and Human Services
Respondent

Petition for Writ of Certiorari to
the United States Court of Appeals
for the Federal Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the courts below erred in denying relief based on the contentions that no causal connection was made between the protected activities and the removal; where the presiding official refused to allow any evidence or witnesses of the protected activities, but, relied upon that causal connection in making her decision to affirm the removal? Whether this is a violation of procedural due process and equal protection of the laws; 5th and 14th Amendment rights?

2. Whether selective enforcement of the performance standard in a discriminatory manner which permits the singling out of targeted employees for removal deprives petitioner of 5th and 14th Amendment rights of due process and equal protection of the laws?

3. Whether petitioner was deprived of procedural due process protection and equal protection of the laws where the agency violated its own policies, which had statutory and regulatory basis established under 5 USC § 7117 by removing the petitioner based on a mid-term progress review rather than a performance appraisal as required by the agency's approved performance management system?

4. Whether the petitioner was deprived of procedural due process and equal protection of the law where the agency and the courts below failed to consider the factors established by the MSPB in *Douglas v. Veterans Administration* (1981) 5 MSPB 313 in reviewing the appropriateness of the penalty, 5th and 14th Amendment rights?

5. Whether the Regional Director's management principle *Matthew, 5th Chap., 29th Verse,* "If thy right eye offend thee, pluck it out and cast it from thee . . ." deprives the petitioner of 5th and 14th Amendment rights of liberty and property, without due process and equal protection of the laws?

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OCTOBER TERM, 1985

NO. 84-1663

Leara Denson, *Petitioner*

v.

Department of Health and Human Services
Respondent

Petition for Writ of Certiorari to
the United States Court of Appeals
for the Federal Circuit

The petitioner, Leara Denson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Court entered on 14 March 1985.

OPINION BELOW

On March 15, 1983, the presiding official affirmed the agency's penalty of discharge. Decision is attached as Appendix A.

The full Board denied the petitioner's petition for review June 18, 1984. Decision is attached as Appendix B.

The Court of Appeals entered its decision affirming the removal of the petitioner March 14, 1985. Decision is attached as Appendix C.

The Court denied petitioner's petition for rehearing and suggestion for rehearing *en banc* April 29, 1985. A copy of the order is attached as Appendix D.

JURISDICTION

On 14 March 1985 the Court of Appeals entered judgment affirming the removal of the petitioner from her job. [App. C] The jurisdiction of this Court is invoked under Title 5, United States Code, Section 7703.

Constitutional Provisions Involved

United States Constitution, Amendment 5:

Nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, Amendment 14:

Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Other Provisions Involved

Title 5, United States Code, Section 2301(b):

Federal personnel management should be implemented consistent with the following merit system principle:

Title 5, United States Code, Section 2302(b):

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority —

Title 5, United States Code, Section 7117:

Duty to bargain in good faith; compelling need; duty to consult.

Title 5, United States Code, Section 7703(c)(1)(2)(3):

In cases filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be:

1. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

2. Obtained without proceedings required by law, rule, or regulation having been followed; or

3. Unsupported by substantial evidence . . .

Statement of the Case

This is a petition by a federal employee of her discharge. On October 1, 1982, Leara Denson (hereafter "petitioner") was discharged from her position as General Accounting Clerk by the Department of Health and Human Services for her alleged failure to meet the performance standard of a general accounting clerk. She appealed the discharge on October 20, 1982. A hearing was held in Atlanta, Georgia before a presiding official of the Merit Systems Protection Board (hereafter MSPB) on December 16, 17, and 20, 1982. On March 15, 1983, the presiding official affirmed the agency's penalty of discharge.

The petitioner appealed the decision of the presiding official to the full Board on May 19, 1983. The Board denied the petitioner's petition for review on June 18, 1984.

The petitioner appealed to the United States Court of Appeals for the Federal Circuit on July 19, 1984, and the case was docketed September 6, 1984. On March 14, 1985, the Court of Appeals affirmed the decision of the MSPB.

A timely petition for rehearing and rehearing *en banc* pursuant to Rule 19 of the Federal Rules of Appellate Procedure was filed on March 26, 1985, and the petition was denied on April 29, 1985.

Reason for Granting Writ

Whether the courts below erred in denying relief based on the concentions that no causal connection was made between the protected activities and the removal; where the presiding official refused to allow any evidence or witnesses of the protected activities, but, relied upon that causal connection in making her decision to affirm the removal? Whether this is a violation of rocedural due process and equal protection of the laws; 5th and 14th Amendment rights?

In order to establish an affirmative defense of reprisal, the petitioner attempted to show a causal connection by presenting evidence and witnesses of her protected activities at the initial MSPB hearing. The presiding official ruled that these protected activities were irrelevant to the removal action. TR 138* (1-4), 204-208, 212-217, and 326-331.

*TR reference to MSPB hearing transcript

In *McClellan v. US Postal Services* (1/31/84, MSPB) Doc. No. ATO728110662 MSPB held:

> In order for employee to show he was object of prohibited personnel practice, such as reprisal for participating in union activities, he must show that activity was protected, that he was consequently treated adversely by agency, that deciding official involved knew he was engaged in protected activity, and that there was causal connection between protected activity and adverse action; retaliatory motive may be inferred where . . .; fact that agency imposes serious penalty for minor offense is indicative that agency action were retaliatory.

The United States Court of Appeals for the Federal Circuit ruled in *Frazier v. Merit Systems Protection Board*, 672 F2d 150, 166 (1982) that:

> Constructive knowledge of protected activities on the part of one with ultimate responsibility for a personnel action may support an inference of retaliatory intent.
>
> While delegation of authority does not relieve an agency head of responsibility, subordinates with power to effect a personnel action may also be called to account.
>
> Section 2302(b) expressly prohibits '[a]ny employee who has authority to take, direct others to, take, recommend, or approve any personnel action' from taking such an action for prohibited reasons.
>
> Official knowledge of protected activities constitutes an essential element of a reprisal finding.

In the initial MSPB decision the presiding official established at page 4, Appendix A that:

> I find that the appellant has engaged in protected activities. The current adverse action taken against appellant followed these activities, and it was established to my satisfaction that the deciding official, Ms. Aguilar, knew about appellant's activities. Therefore, appellant must establish that there is a

> causal connection between the protected activities and the adverse action. If she meets this challenge, she must still establish that the protected activities were significant factors in taking the adverse action.
>
> Appellant did not present any evidence of a causal connection between her protected activities and the adverse action.

The United States Court of Appeals for the Federal Circuit ruled in *Sullivan v. Department of Navy* 720 F2d 1266 (1983) where there is an error of law with respect to its interpretation of the requirements of a defense of reprisal, the MSPB decision should be set aside. The court stated:

> As I understand, what the board is holding reprisal cannot be established if the case against an employee is a good one, the person instigating removal proceedings does not actually take the removal action himself. I find this is error, as a matter of law, on both points. . . . In an adverse action proceeding, the affirmative defense of reprisal is significant only in those cases which have been determined to have merit. Thus, the merits cannot be the determinative factor that there was no reprisal. A meritorious adverse action must be set aside where there is reprisal.
>
> The second factor, that is, that Westbrook did not take a personnel action, is invalid, in my view, under 5 USC § 2302(b) as a matter of statutory construction. The section reads, in pertinent part:
>
> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority ——.

The presiding official refused to allow any evidence or witnesses of the petitioner's protected activities preventing her from establishing a firm causal connection between protected activities and the adverse action. The petitioner could only muster the inferences of retaliatory motives held in Frazier supra, and McClellan supra.

In March 1980, after the petitioner returned to work from sick leave with pneumonia with a recommendation from her doctor that she not be returned to work in the freezer and refrigerator until further evaluation, Mr. Zapatka, Director of petitioner's work unit, told her that she would return to work in the freezer or she would not have a job at the Food and Drug Administration. He then subjected her to traumatic and incessant harassment causing her to file a grievance under negotiated grievance procedures. Mr. Zapatka detailed the petitioner out of the Laboratory immediately upon her filing the grievance. He stated: "Ms. Denson's conduct may affect the conduct of other employees." TR 216 (23-24). She was left to sit in an indefinite status for more than a year until: "they made a decision that Ms. Denson was not going to apply for a disability retirement." TR 251 (17-18).

The agency on two occasions (once "under penalty of perjury") declared to MSPB that the agency considered Mr. Zapatka to be party to the removal action taken against the petitioner.

There is evidence that Ms. Aguilar, proposing official in the removal, assisted Mr. Zapatka and the agency in the preparation of its case against the petitioner in the appeal of her downgrade to the MSPB. Ms. Aguilar admitted at the MSPB hearing that she made the statement "Don't get mad, get even." TR 147 (22-23).

Mr. Kinslow's, Regional Director, management principle of *Matthew 5th Chapter, 29th Verse:* ". . . if thy right eye offend thee, pluck it out and cast it from thee . . ." was the motivating factor in the removal. He vowed that anyone who does not like working in Atlanta Food and Drug Administration, Region IV, "You are going to find it hellish and if you think I don't know what I'm talking about, just wait and see." (Exhibit G, page 2, para 1 & 2 of petitioner's informal brief to Court of Appeals and Exhibit A of petitioner's petition for review to the MSPB.) Mr. Kinslow testified against the petitioner at the MSPB hearing even though he did not have any knowledge of her job performance. He testified that he knew of her protected activities TR 26 (16-17) and 29 (1-12).

The petitioner was a "career status" civil servant with more than seventeen years of commendable federal service, and had property and liberty interest in her continued employment. She was deprived of these constitutional rights as a reprisal for her use of negotiated, MSPB and Special Counsel procedures.

The property interest in continued employment, except removal for "just cause" are explained in decisions of the Supreme Court: In *Board of Regents v. Roth,* 408 U.S. 564, 577 the court held:

> Property interests in continued employment 'are created and their dimensions are defined by existing rules of understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and support claims of entitlement to those benefits.'

The same issue was addressed and upheld in: *Perry v. Sindermann,* 408 U.S. 593, 601 (1972); *Heath v. Redbud Hospital District,* 620 F2d 207, 210 (9th Cir. 1980); *Bishop v. Tice,* 622 F2d 349, 354 (8th Cir. 1980); *Fritz v. Norblad,* 566 F Supp. 1459, 1462 (DC Oregon 1983).

"The fundamental requisite of due process of law is the opportunity to be heard" *Grannis v. Ordean,* 234 U.S. 385, 394 (1914). The procedures in *Arnett V. Kennedy* 416 U.S. 134, 170 (1974) provided a "full evidentiary hearing" (Powell, J., concurring). "Such a hearing includes the right to present witnesses."

The petitioner has been deprived of procedural due process and equal protection of the law by the failure of the presiding official to allow her to present evidence and witnesses to establish her affirmative defense of reprisal.

The decision of the Court of Appeals in judgment of petitioner's case is in conflict with its decisions in the cases of Frazier supra and Sullivan supra.

Reason for Granting Writ

Whether selective enforcement of the performance standard in a discriminatory manner which permits the singling out of targeted employees for removal deprives petitioner of

5th and 14th Amendment rights of due process and equal protection of the laws?

This issue was raised at the initial MSPB hearing. The presiding official ruled and passed on the question by stating: "As for her allegation that other employees make mistakes, this is probably true, but the other employees had not been placed under a warning for performance."

In *Mabey v. Reagan* (9th Cir. 1972) 537 F2d 1036 the court held that:

> A discriminatory application of the rules, indicates true moving factors lay elsewhere.

In *Filip v. Veterans Administration* (6/1/83 MSPB) Doc. No. CHO7528110504 MSPB ruled:

> Penalty cannot be sustained when employee shows that other employees were disciplined less harshly for same offense and agency has not shown legitimate reason for difference in treatment.

In *Mizerak v. Adams* (1982 CA2 NY) 682 F2d 374 the court held:

> Agency decision is arbitrary and must be set aside when it rests on crucial factual premise shown by agency records to be indisputably incorrect.

The agency arbitrarily enforced the performance standard only against the petitioner in retaliation for her use of negotiated, MSPB, and Special Counsel procedures.

The petitioner had been in the position of general accounting clerk for less than one year at the time of her removal for alleged failure to meet the performance standard. The petitioner's more experienced co-workers, with three and fourteen years in the accounting section, testified at the MSPB hearing that they made the same type errors allegedly made by the petitioner TR 113 (10-17), 232 (9-14), 235 (17-25), and 301 (4-14). This was also affirmed by Ms. Aguilar, the proposing official in the removal, at the MSPB hearing in which she explained the poor track record of the more experienced employees when she took over the Fiscal Section in 1980 causing the accounting system to be out of balance by $12,000.00. (TR) at 62 (9-25) and 98 (10-15). The agency's

records show these same employees still had flagrant violations of the performance standard in 1982, but had not and still did not receive any type of disciplinary action. They were assigned to train the petitioner.

The arbitrary and capricious actions of the agency are even more evident by a comparison of the petitioner's performance with that of her co-workers. The disparity with which the petitioner was removed is obvious. Some major areas are:

The petitioner allegedly failed to take available discounts, approximately $3.00 (three dollars) causing loss monies to the government. This was an approximate five percent (5%) of the known $54.00 in loss monies for failure to take available discounts for FY 82. The other more than $51.00 in loss discounts on at least twenty-four (24) different occasions was lost by the other two clerks of the accounting section.

She allegedly made illegal tax payments, $1.10. This was an approximate one percent (1%) of the more than $90.00 in illegal tax payments by the other two accounting clerks involving at least twenty-six (26) different occasions.

The number of invoices alleged not paid within seven days by the petitioner is approximately thirty (30) of more than 3000 processed. Less than fifty percent (50%) of her co-workers' invoices were paid within the seven-day established timeframe. This amounted to hundreds of invoices being paid late.

Petitioner was required to perform at a 90% error-free level in Critical and Non-Critical elements to fully meet the standard, while her co-workers were only required to perform at an 80% error-free level in Critical elements to fully meet the performance standard (TR 192 (17-18). The petitioner's overall performance was well above the 90% error-free level; she fully met the performance standard of a general accounting clerk.

The petitioner explained other erroneous information and contradictions of the hearing transcript and the alleged substantial evidence submitted by the agency in her brief and reply brief to United States Court of Appeals for the Federal Circuit; which prove the records are incorrect.

Petitioner requests consideration of these briefs if the request for Certiorari is granted.

The court below and the MSPB based their decisions in part on the fact that the petitioner did not deny that she made errors. This is in conflict with the decisions of the United States Court of Appeals for the Federal Circuit in *Sullivan v. Department of Navy,* 720 F2d 1266 (1983) and *Miguel v. Department of Army,* 727 F2d 1081 (1984) in which neither petitioner denied the allegations. The petitioner was placed in the position of accounting clerk, after being downgraded, as being minimally qualified. The charge was not whether she made errors, but whether she fully met the performance standard. The standard clearly allowed for a margin of error. Based on the minor nature of the petitioner's alleged errors and other mitigating circumstances, the penalty of removal imposed upon her by the agency was arbitrary, capricious, and an abuse of discretion. The alleged errors submitted by the agency was an approximate 5% error rate of her total workload. This percent is further reduced by the fact that most of the alleged errors are totally untrue.

The agency intentionally and maliciously stigmatized the petitioner's reputation, good name and integrity with the false label of incompetence. The petitioner, in seeking other employment, has been forced to communicate this stigma to the area of the public, potential employers, which caused the greatest damage to her rights to find other employment.

The willful and wrongful actions of the agency deprives the petitioner of property and liberty interest in continued employment and deprives her of equal protection of the laws as afforded to her co-workers.

Reason for Granting Writ

Whether petitioner was deprived of procedural due process protection and equal protection of the laws where the agency violated its own policies, which had statutory and regulatory basis, established under 5 USC 7117 by removing petitioner based on a mid-term progress review rather than a performance appraisal as required by the agency's approved performance management system.

Raised at Court of Appeals level. The court did not rule on the question.

In *Dowdy v. Johnson*, 510 F Supp. 836 (D.C. VA 1981), the court upheld the three circumstances in which, according to the Caceres Court, *United States v. Caceres*, 440 U.S. at 749-753, a departure from agency guidelines may state a claim cognizable by a federal court:

> When compliance with the agency regulation is mandated by the Constitution or federal law;
>
> When an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency; or,
>
> When the violation of the agency regulation arguably amounts to a denial of equal protection.

The agency's approved performance management system reads in pertinent part: Agency's alleged evidence at Tab 8. Page 1, para. 430-4-00 C PURPOSE AND INTRODUCTION in part:

> To facilitate the proper utilization and equitable treatment of employee, to increase the productivity and effectiveness of the Department by improving employee performance.

Para. 430-4-00 D states:

> Certain provisions in this Instruction have a statutory or regulatory basis or are so significant that the Department *will not* consider exceptions to them other than under 5 USC 7117. These provisions contain the verb "will" underscored. Other provisions in this Instreuction are based on principles of sound management. These provisions contain the verb "will," not underscored. Heads of Principal Operating Components (POCs) may request the Assistant Secretary for Personnel Administration (ASPER) to approve exceptions to these provisions based on the special characteristics of their work force, mission, work environment or management systems. Finally, several provisions in this Instruction are not require-

> ments, but rather recommendations and thus contain the verb "should." Heads of POCs may change these provisions without prior approval from ASPER.

Ms. Aguilar, proposing official, and Mr. Frank, deciding official, in the removal has personal knowledge of the flagrant violations of the performance standard by the other accounting clerks. Ms. Aguilar or Mr. Frank approved each of the schedules for payment with these flagrant violations by the other accounting clerks.

During the very time that Ms. Aguilar stated that she had conducted the mid-term progress review, mid-April 1982, she processed and had personal knowledge of more than thirty (30) invoices that had not been paid within the seven-day timeframe by one of the other two accounting clerks causing $6.38, on seven different occasions, to be lost in available discounts. According to that clerk, Ms. Aguilar did not mention the lost discounts or the late payment of the invoices in her mid-term progress review. One of the invoices was more than 120 days old. Yet, she singled out the petitioner for the alleged loss of $1.05 in available discounts on one occasion, and used that as a basis to issue the petitioner the Notice of Unacceptable Performance.

The disparity in the treatment of the employees is a prohibited personnel practice under 5 USC § 2302(b)(9)(11):

> Take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by law, rule, or regulation;
>
> Take or fail to take any other personnel action if the taking or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in Section 2301 of this title [5 USC § 2301].

The arbitrary actions by the agency against the petitioner deprives her of the equal protection of the laws and violate the merit principles of 5 USC § 2301(b)(2)(6)(8)(a):

> All employees and applicants for employment should

> receive fair and equitable treatment in all aspects of personnel management . . .
>
> Employees should be retained on the basis of the adequacy of their performance,
>
> Employees should be protected against arbitrary action . . .

Page 5, para. 430-4-50 of the agency's approved performance management system reads in part at A:

> The official performance period in the Department will begin January 1 and end on December 31 of each year. However, in the first year as a transition to implementing the new approach, the performance appraisal period will be 15 months long from October 1, 1981 to December 31, 1982, with appraisals completed in January 1983.

Page 9, para. 430-4-80 (CONDUCTING PROGRESS REVIEWS) at A(5):

> Documented progress reviews *will* provide for and document on the Department form the employee's progress in comparison to the performance expectations, any problems encountered or anticipated, any corrective actions taken or planned and any changes in the performance expectations warranted by changes in the work situation including those beyond the control of the individual.

Page 11, para. 430-4-100 (MAKING PERFORMANCE APPRAISAL-BASED DECISIONS):

> At A page 11: The results of the performance appraisal *will* be a basis for certain formal decisions and actions which are cited below.
>
> At J, page 12: If the employee has failed or is failing to meet one or more critical job elements, appropriate action *will* be taken. It may include initiating steps toward demoting or removing the employee.

The petitioner was not given the opportunity to take advantage of the full transitional period (15 months) in implementing the new performance standard. She was given a

Notice of Unacceptable Performance after performing under new approach for only seven (7) months. And, removed from her position after ten (10) months. Arbitrarily removing only the petitioner based on a mid-term progress review rather than a performance appraisal, and departing from the provisions of the instructions of the agency's approved performance management system without the required approved exceptions deprives the petitioner of procedural due process and equal protection of the laws.

Reason for Granting Writ

Whether the petitioner was deprived of procedural due process and equal protection of the law where the agency and the courts below failed to consider the factors established by the MSPB in Douglas v. Veterans Administration *(1981) 5 MSPB 313 in reviewing the appropriateness of the penalty. A violation of 5, 14 Amendment rights.*

(Raised at Court of Appeals level, but not ruled upon.)

In *Griffin v. Department of Army* (7/28/83 MSPB) Docket No. DCO7528210399 the MSPB established:

> In reviewing appropriateness of penalty, agency must consider factors contained in *Douglas v. Veterans Administration* (1981) 5 MSPB 313, including mitigating circumstances, seriousness of offense, past disciplinary record, work and length of service, consistency of penalty with agency's table of penalty, whether employee had notice of rules violated and whether employee had potential for rehabilitation.

The appropriateness of the penalty was raised on at least eight (8) separate occasions before the MSPB. (TR) 29-33, 189 (1-4), 228 (11-22), 262 (16-25), 263 (1-25), 267 (10-19), 284 (1-25), and 285 (1-12).

The United States Court of Appeals for the Federal Circuit established in the case of *Miguel v. Department of Army* 727 F2d 1081 at 1083:

> Whether in a given case the penalty imposed by the agency amounts to an abuse of discretion, depends upon the unique circumstances of each case.

In that case, the Court of Appeals, Bennett, Circuit Judge, held that:

> The penalty of removal was an abuse of discretion where, at the time of the removal, the employee had serve for 24 years, had received numerous commendations and had never previously been the subject of disciplinary action.

The penalty of removal imposed upon the petitioner by the agency was irrational in view of the mitigating circumstances most of which were imposed upon the petitioner by the agency:

The petitioner had more than seventeen (17) years of commendable service at the time of her removal. She had never been even so much as rebuked prior to her becoming ill with pneumonia in January 1980.

The petitioner had been in the position of accounting clerk for only seven (7) months when she received the Notice of Unacceptable Performance. She was in training six of the seven months. She was put in the position of accounting clerk as being minimally qualified.

The petitioner was scheduled for three different mandatory training courses requiring that she be away from her desk ten (10) of the forty-one (41) working days during the sixty-day notice period, while her work was being 100% reviewed. All courses were successfully completed just two weeks prior to the end of the notice period. She was not given the opportunity to apply the knowledge she had learned. The presiding official (MSPB) erroneously did not find that the 10 days away from her desk had an adverse affect on her performance.

The petitioner was continually given new duties until she eventually had an unfair division of the workload. Still more new duties were added on March 10, 1982, just prior to the mid-term progress review, mid-April 1982. Performance of the new duties were to begin on April 1, 1982. Petitioner went on unexpected sick leave on March 29, 1982 for non-elective surgery. She returned on May 10, 1982 and received the Notice of Unacceptable Performance on May 11, 1982.

Circumstances imposed upon the petitioner by the agency were designed to continue the harassment which began in

February 1980; to humiliate and frustrate her in the performance of her duties and to remove her from her position without being given an equal opportunity to compete. The petitioner strived to make the best use of the time that she had at her desk and to make up for the time that she had to attend mandatory classes during the sixty-day notice period to improve performance.

Reason for Granting Writ

Whether the Regional Director's management principle: Mathew 5th Chapter, 29th Verse — *"If thy right eye offend thee pluck it out and cast it from thee. . ." deprives the petitioner of the 5th and 14th Amendments rights of liberty or property, without due process of law or equal protection of the laws.*

The question was raised on petition for review of the MSPB initial decision. The full Board denied the petition for review. The Court of Appeals did not rule on the question.

The Courts established the rule that "While freedom to believe is absolute, the exercise of religion is not" in *Reynolds v. United States,* 98 US 145, 164 (1879); *Cantwell v. Connecticut,* 310 US 296, 303-304 (1940); *Sharp v. Sigler,* 408 F2d 966 (8th Cir. 1968); *United States v. Kuch,* 288 F Supp. 439 (D.D.C. 1968); *Costello Pub. Co. v. Rotelle,* 670 F2d 1035, 1049 (DC Cir. 1981); *Childs v. Duckworth,* 705 F2d 915, 920 (7th Cir. 1983); and *Meroni v. Holy Spirit Ass'n for Unification of World Christianity,* 480 NY S2d 706 (NY Sup. 1984).

Mr. Kinslow, Regional Director, issued a written directive to his managers that he operates under the management principle of *Matthew 5th Chapter, 29th Verse,* which states in part: And if thy right eye offend thee, pluck it out and cast it from thee. He vowed that anyone who does not like working in Atlanta Food and Drug Administration, Region IV, "you are going to find it hellish and if you think I don't know what I'm talking about, just wait and see."

This management principle was the underlying motive in the removal of the petitioner in retaliation taken against her for the use of negotiated, MSPB and Special Counsel procedures. It shows the mind of the agency in dealing with

employees in an unfavorable status. Mr. Kinslow has authority to take, direct others to take, recommend or approve any personnel action against any employee in his region.

Mr. Kinslow appeared at the MSPB hearing and testified under oath of an incident that never happened. He alleged, and seemed upset, that he spoke to the petitioner on one occasion and she did not speak back. Petitioner has no knowledge of this alleged incident and does not know when it allegedly happened.

As far as she knew, Mr. Kinslow was not in anyway involved in her removal. She remembered the controversy in the Food and Drug Administration Laboratory concerning his management principles at the time the directive was discovered in 1976. The directive was only issued to his managers; the petitioner was unable to contact anyone that was willing to mail a copy to her attorney until after the MSPB hearing records had been closed. The MSPB Board did not consider the directive as new and material evidence.

Mr. Kinslow testified against the petitioner at the MSPB hearing despite the fact that he did not have any knowledge of her job performance. He testified that he knew of the petitioner's protected activities. He stated that he found Ms. Aguilar, the proposing official in the removal, to be "dedicated" and "effective." She received a promotion and a substantial pay increase shortly after she proposed to remove the petitioner. She admitted at the hearing that she stated "Don't get mad, get even."

Religious beliefs used in this manner infers reprisal for any offender and presents a causal connection between the petitioner's protected activities and her removal. The removal deprives her of her property and liberty interest in continued employment. It deprives her of equal protection of the laws.

CONCLUSION

For the foregoing reasons, Leara Denson respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

Leara Denson
2571 Candler Road, Apt. B-1
Decatur, Georgia 30032
(404) 243-0527

APPENDIX A

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

In the Matter of: Leara Denson, *Appellant* *v.* Department of Health and Human Services, *Agency*	Decision Number ATO4328310037 DATE: Mar. 15, 1983

INTRODUCTION

By petition filed October 20, 1982, Leara Denson (hereinafter appellant) appealed to the Atlanta Regional Office, Merit Shystems Protection Board from the action of the Department of Health and Human Services, Food and Drug Administration (FDA), Atlanta, Georgia (hereinafter agency), removing her from the position of General Accounting Clerk, GS-5, effective October 1, 1982. The action was based upon appellant's alleged failure to meet the performance requirements for two critical elements and two noncritical elements of her position.

In her petition, appellant contends that the performance appraisal system was unlawful because the requirements were unattainable and the system is subject to abuse in that it allows for targeting of an individual employee. Further, appellant alleges that the action was taken in retaliation for appellant's previous utilization of union and administrative grievance procedures to protect her health. She seeks reinstatement and a reassignment.

Appellent requested a hearing in connection with her appeal, and such a hearing was conducted on December 16, 17 and 20, 1982, in Atlanta, Georgia. Both parties were present at this hearing and the testimony, documentary

evidence, and argument presented during the hearing in addition to the evidence contained in the record have been considered in deciding this case.

JURISDICTION

The Board has authority to hear and adjudicate all matters within its appellate jurisdiction as provided by law, rule, or regulation. 5 U.S.C. §§ 1205(a)(1) and 7701(a). The agency proposed and effected appellant's removal pursuant to an Office of Personnel Management approved performance appraisal system established pursuant to chapter 43 of title 5. 5 U.S.C. §§ 4301-4305. Accordingly, the Board's appellate jurisdiction over the appeal is founded upon 5 U.S.C. §§ 4303(e) and 7701(a). As an employee in the competitive service who was removed under 5 U.S.C. §§ 4303, appellant is entitled to appeal the action to the Board.

ANALYSIS AND CONCLUSIONS OF LAW

The agency took this action pursuant to 5 U.S.C § *4303 Therefore, under the Reform Act and the Board's regulations, the agency must support its reasons by substantial evidence.*[1] 5 U.S.C. § 7701(c)(1)(A); 5 C.F.R. § 1201.56(a)(1)(i). Even if the charges are sustained, the Board is required to overturn an agency action if appellant establishes an affirmative defense to the action. 5 C.F.R. § 1201.56(b).

Once an approved performance appraisal system is in effect, chapter 43 provides that an agency may remove an employee for "unacceptable performance" under the "streamlined procedures" of 5 U.S.C. § 4303. *Wells v. Harris* 1 MSPB 199, 201 (1980). "Unacceptable performance" is defined as "performance by an employee which fails to meet established performance standards in one or more critical elements of such employee's position." 5 U.S.C. § 4301(3). The Office of Personnel Management (OPM), at 5 C.F.R. § 430.202(e), defined "critical element" as:

> . . . a component of an employee's job that is of such sufficient importance that performance below the minimum standard established by management requires remedial action and denial of a within-grade increase, and may be the basis for removing or reduc-

> ing the grade level of that employee. Such action may be taken without regard to performance on other components of the job.

The agency in this case showed that it had established a performance appraisal system which OPM had approved.[2] It further showed that the employees had been apprised of the requirements and asked for their comments on the system before its institution.[3] It is under this system that appellant's performance was evaluated.

By notice dated July 30, 1982, appellant was notified by Judith Aguilar, Administrative Assistant, that her removal was proposed for unsatisfactory performance in four (4) elements of her job as General Accounting Clerk, two of which were critical. Specifically, appellant was charged with failure to audit and process invoices for payment within seven days of receipt (critical), failure to post all required entries timely resulting in inaccurate disbursements (critical), failure to correct errors in computer data (non-critical) and failure to utilize quality assurance procedures for accomplishment of work of overall high quality in a timely fashion (90% error-free rate, non-critical).

Appellant only made a written reply, and the charges were sustained by Stratton M. Frank, Administrative Officer, FDA. The removal action was effected as proposed.

The agency presented documentary evidence and testimony by Ms. Aguilar to support its charges of unsatisfactory performance. It also presented evidence of the counseling sessions held with appellant and the additional training given appellant. Appellant challenged the counseling sessions and the relevancy of the training offered (typing courses, government course on travel vouchers). She did not deny that the counseling sessions occurred, but asserted that she gained no assistance from them due to the "hostility" of Ms. Aguilar. Although I gleaned from other testimony that Ms. Aguilar was a "no-nonsense" supervisor, I do not believe that this attitude would constitute hostility or hinder appellant from asking questions about her performance. Thus, I do not find that appellant's perception of the counseling sessions rebutted the relevance of such sessions.

It woud appear from the evidence presented that appellant failed to take advantage of the sessions.

As for the typing course, Ms. Aguilar testified that she had determined such training would assist appellant in completing her tasks in a timely fashion. There was other testimony, however, indicating that typing did not consume much of a Clerk's time, and appellant testified that she told Ms. Aguilar that she already knew how to type. The direct relevancy of the typing course may be questionable, but I can see where it would be tangentially helpful to appellant to assist her in processing documents in a more timely fashion. Assuming *arguendo* that the typing course was not relevant, I do not find that the time for the course adversely impacted on her performance as the agency considered the time for the course. Moreover, it did not take the whole day.

As for the actual errors enumerated by the agency, appellant did not deny that she made the mistakes. TR. at 383. Her argument was that she did not make any more mistakes than any other employee. Also, she attempted to establish that she had a greater quantity of work which would result in more errors and that the samples examined by Ms. Aguilar were not randomly selected.

I do not find that appellant's explanations rebut the agency's charges of unsatisfactory performance. She has referred to the quantity of work given her, but she did not apprise the agency of this alleged discrepancy. Further, Ms. Aguilar testified that the work examined by appellant, the bus bills in particular, was very rote in nature and required little time to complete. Appellant seemed to agree with this evaluation because she viewed her whole job as clerical requiring little more than a fifth grade education. Thus, I do not find that this alleged discrepancy in work distribution refudiates the agency's charges. As for her allegation that other employees make mistakes, this is probably true, but the other employees had not been placed under a warning for performance. Consequently, I find this argument to be unpersuasive as well as the allegation that the samples examined by Ms. Aguilar were not rendomly selected.

Therefore, I find that the agency has established the charges by substantial evidence, and thus I am sustaining the charges. This determination, however, does not conclude my evaluation of the case. Appellant has charged that the action was taken in reprisal for certain protected activities, filing grievances and an appeal before the Board. This charge constitutes an affirmative defense which must be established by a preponderance of the evidence. *Shockro v. Federal Communications Commission*, 5 MSPB 181 (1981).

A claim of reprisal for filing a grievance or an appeal constitutes an allegation of a prohibited personnel practice under 5 U.S.C. § 2302(b)(9). To establish a violation of section 2302(b)(9), an appellant must demonstrate that he or she engaged in an activity protected by the section; that he or she was subsequently treated in an adverse fashion by the employer; and that the deciding official had actual or constructive knowledge that the employee was engaged in the protected activity. Appellant must also demonstrate that there is a causal connection between the protected activity and the adverse action and that the protected activity was a significant factor in the taking of the adverse action. *Gerlach v. Federal Trade Commission*, MSPB Docket No. DC07528010020 (December 15, 1981); *In the Matter of Frazier*, 1 MSPB 159 (1979).

Appellant testified that in June, 1980, she filed a grievance regarding her physical problems and the agency's resulting treatment. TR. at 340. She also stated that she had filed an appeal with the Board, which the agency knew. TR. at 400. Thus, I find that appellant has engaged in protected activities. The current adverse action taken against appellant followed these activities, and it was established to my satisfaction that the deciding official, Ms. Aguilar, knew about appellant's activities. Therefore, appellant must establish that there is a causal connection between the protected activities and the adverse action. If she meets this challenge, she must still establish that the protected activities were significant factors in taking the adverse action.

Appellant did not present any evidence of a causal connection between her protected activities and the adverse action. Further, assuming *arguendo* that a causal connection does

exist, I find that the protected activities were not significant factors in the taking of adverse action. Therefore, I find that appellant has not shown that her removal was taken in reprisal for her engagement in protected activities.

Having considered the evidence presented, I find that the agency has supported its reasons for removing appellant for unsatisfactory performance under 5 U.S.C. § 4303 by substantial evidence and that appellant has not established her affirmative defense. Therefore, I am affirming the removal.

DECISION

The removal action is AFFIRMED.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on April 13, 1983, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed;

(b) The decision of the presiding official is based upon an erroneous interpretation of the statute or regulation.

Pursuant to 5 U.S.C. § 7703(b)(1),[4] the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439, no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

CATHERINE ARMSTRONG
Presiding Official

NOTES

1. Substantial evidence is defined by the Board as follows:

   That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true. 5 U.S.C. § 1201.56(c)(1).

2. Appellant did not challenge the agency's assertion that OPM had approved the performance appraisal system. Furthermore, the agency submitted documentary evidence of OPM's approval. See Agency File, Tab 8, OPM's letter of March 13, 1981.

3. Appellant did attempt to show that any suggestions for a change in the system were not accepted by the agency. Even assuming this were the case, I find that any such challenge does not rebut the appropriateness of the system, particularly in light of appellant's testimony that she found the system to be fair and much better than the previous method of evaluation. See Tr. at 286.

4. As modified by § 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. § 1295(a)(9).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Leara Denson *v.* Department of Health and Human Services	Docket Number ATO4328310037

APPENDIX B — OPINION AND ORDER

Appellant was removed from her position of Accounting Clerk on the basis of unsatisfactory performance. She appealed to the Atlanta Regional Office of the Board alleging, *inter alia,* that the agency action was taken in reprisal for her having previously utilized negotiated grievance and administrative procedures. The presiding official found that appellant failed to carry her burden of proving reprisal and that the agency action was supported by substantial evidence. Accordingly, she sustained appellant's removal.

In her petition for review, appellant alleges error by the presiding official in: (1) finding that appellant failed to prove reprisal; (2) permitting one of appellant's co-workers to testify at the hearing despite the agency's alleged refusal to allow her to depose that witness; and (3) refusing to allow appellant to examine a prior supervisor in regard to the allegation of reprisal. Also, appellant alleges new and material evidence concerning her case is now available.

With respect to appellant's allegation of reprisal, the presiding official found that appellant failed to satisfy all of the necessary criteria for establishing reprisal as set forth in *Gerlach v. Federal Trade Commission,* MSPB Docker No. DC07528010020 at 4, and *In re Frazier,* 1 MSPB 159, 186 (1979). She found that appellant showed that she had engaged in protected activities, *i.e.,* utilized negotiated grievance and Board procedures; that she was subsequently treated in an adverse fashion by the agency, *i.e.,* removed; and that the deciding official had actual knowledge that appellant had engaged in the protected activities. However, the presiding official found that appellant failed to show a causal connection between the protected activities and the

adverse action. *See Gerlach, id; Frazier, id.* In her petition appellant merely refers to various portions of the transcript. Appellant has not shown, nor is it discernible from the portions of the transcript cited, that the presiding official erred in finding that appellant did not establish the requisite causal connection. Thus, appellant has failed to demonstrate error by the presiding official in finding no showing of reprisal.

In regard to the challenged testimony of her co-worker, appellant alleges that the agency refused to permit her to depose the witness on the basis that the witness' testimony was irrelevant to her case but that the presiding official nevertheless erroneously allowed the witness to testify over appellant's objection. In response to this contention, the agency alleges that it offered to make the witness available for deposition at the worksite but the appellant's counsel refused, demanding that the deposition be taken in his office. Without deciding the credibility of either party on this issue, we find that appellant failed to avail herself of the Board's subpoena powers in obtaining the deposition of that witness.* *See* 5 C.F.R. § 1201.81; *Fuiva v. Department of Justice,* 3 MSPB 217, 218 (1980). Since appellant failed to submit a motion for a subpoena to the presiding official, we find that the presiding official properly allowed witness to testify.

As to her contention that the presiding official erred in refusing to allow her to call her former supervisor to testify, appellant alleges that the supervisor, Steven McKay would have testified regarding a 1980 memorandum he prepared of a meeting in which an agency official, "Mr. Zapatka," allegedly stated that appellant's "conduct may affect the conduct of other employees." Hearing Transcript (Tr.) at 216. Appellant asserts that she needed Mr. McKay's testimony to determine whether Mr. Zapatka was referring to appellant's union activities. Tr. at 216-17. However, appellant failed to establish that Mr. Zapatka had any supervisory control over her or was in any way involved in or responsible for her removal. Tr. at 216. Thus, appellant failed to show the relevancy of Mr. McKay's testimony, and we find that the presiding official acted within her discretion in

denying the appearance of that witness. *See Klant v. Department of the Army*, 5 MSPB 393, 394 (1981).

In support of her allegation of new and material evidence, appellant has submitted a memorandum summarizing a speech delivered by the agency's Atlanta Regional Food and Drug Director. Appellant has not explained why this document was unavailable prior to the closing of the record. Therefore, the document does not qualify as a basis for review. *See Avansino v. U.S. Postal Service*, 3 MSPB 308, 311 (1980).

Accordingly, the petition for review is hereby DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

Date: June 18, 1984
Washington, D.C.

PAULA A. LATSHAW
Acting Secretary

[1]The Board's procedures also provide for orders to compel discovery to be submitted to the presiding official. 5 C.F.R. § 1201.74(a). No request for such an order was filed.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPINION AND ORDER was sent by certified mail this date to the following:

Leara Denson
2571 Candler Road, No. B-1
Decatur, Georgia 30032

by regular mail to:

Dejan S. Vojnovic
Land & Newlin
Suite 620
Six Piedmont Center
Atlanta, Georgia 30305

Mary S. Plummer
Regional Personnel Office
Department of Health and Human Services
Suite 101
101 Marietta Tower
Atlanta, Georgia 30323

Office of Personnel Management
Attn: Appellate Policies Branch
Room 7P56B
1900 E Street, N.W.
Washington, D.C. 20415

by hand to:

Office of the Special Counsel
Merit Systems Merit Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

(Date)

PAULA A. LATSHAW
Acting Secretary

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Leara Denson, *Petitioner*
v.
Department of Health and
Human Services, *Respondent*

Appeal No. 84-1663

DECIDED: March 14, 1985

Before FRIEDMAN, BENNETT, and NEWMAN, *Circuit Judges*. NEWMAN, *Circuit Judge*.

APPENDIX C — DECISION

The decision of the Merit Systems Protection Board (board) in Docket No. AT04328310037, upholding the removal of petitioner by the Department of Health and Human Services, is *affirmed*.

OPINION

We affirm on the basis of the board's decision of June 18, 1984, because we do not find that decision to be arbitrary, capricious, an abuse of discretion, otherwise contrary to law, unsupported by substantial evidence on the record as a whole, or obtained by procedures contrary to those required by law, rule, or regulation. 5 U.S.C. § 7703(c). Petitioner has not denied making the mistakes set forth by the agency, and we find that the presiding official considered petitioner's assertions of mitigating circumstances. Although petitioner contends that the removal action was in retaliation for her having filed a grievance with the agency and an appeal with the board in connection with an earlier reduction-in-grade action, we discern no error in the board's finding that the petitioner failed to establish a causal connection between this protected activity and the present adverse action.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Leara Denson, *Petitioner*
v.
Department of Health and
Human Services, *Respondent*

Appeal No. 84-1663

APPENDIX D — ORDER

A petition for rehearing and a suggestion for rehearing *in banc* having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing *in banc* is declined.

FOR THE COURT

George H. Hutchinson,
Clerk

Date: April 29, 1985

cc: Leara Denson
Victor B. Maddox

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Leara Denson, *Petitioner*
v. Docket No.
Department of Health and
Human Services, *Respondent*

PETITION FOR REVIEW

Notice is hereby given that Leara Denson, petitioner above-named, hereby petitions the United States Court of Appeals for the Federal Circuit for review of the final order of the Merit Systems Protection Board entered in this action on June 18, 1984, made final on June 23, 1984, and received by the petitioner on June 23, 1984.

This 19th day of July, 1984.

DEJAN S. VOJNOVIC
Attorney for petitioner

Suite 705
Six Piedmont Center
Atlanta, Georgia 30305
(404) 266-9551

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Petition for Review upon all interested parties by placing same in the United States Mail with sufficient postage affixed thereto and addressed as follows:

Ms. Mary J. Plummer
Department of Health and Human Services
1601 Marietta Tower
Atlanta, Georgia 30323

Appellate Policies Branch
Office of Personnel Management
Suite 7P568
1900 E Street, N.W.
Washington, D.C. 20415

Ms. Elizabeth C. Woodyard
Appellate Jurisdiction Branch
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

Ms. Leara Denson
2571 Candler Road, No. B-1
Decatur, Georgia 30032

This 19th day of July, 1984.

DEJAN S. VOJNOVIC

In The

Supreme Court
of the United States

OCTOBER TERM, 1985

NO. 84-1663

Leara Denson, *Petitioner*

v.

Department of Health and Human Services
Respondent

PETITION FOR WRIT OF CERTIORARI

Notice is hereby given that Leara Denson, petitioner above named, hereby petitions the Supreme Court of the United States for review of the final decision and order of the United States Court of Appeals for the Federal Circuit entered these actions on March 14, 1984 and April 29, 1985.

This 26th day of July, 1985.

LEARA DENSON
Petitioner
2571 Candler Road, Apt. B-1
Decatur, Georgia 30032
(404) 243-0527

In The

Supreme Court
of the United States

OCTOBER TERM, 1985

NO. 84-1663

Leara Denson, *Petitioner*

v.

Department of Health and Human Services
Respondent

PROOF OF SERVICE

I hereby certify that on this 26th day of July, 1985 I have served two copies of the foregoing Notice of PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT to the parties addressed below by enclosing copies thereof in an envelope, CERTIFIED MAIL, RETURN RECEIPT REQUESTED, addressed to:

Clerk
United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Victor B. Maddox
Commercial Litigation Branch
Civil Division
Department of Justice
Washington, D.C. 20530

LEARA DENSON
Petitioner
July 26, 1985

In The

Supreme Court
of the United States

OCTOBER TERM, 1985

NO. 84-1663

Leara Denson, *Petitioner*

v.

Department of Health and Human Services
Respondent

PROOF OF SERVICE

I hereby certify that on this 26th day of July, 1985, I have served two copies of the foregoing Notice of PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT on counsel for the Respondent by enclosing copies thereof in an envelope, CERTIFIED MAIL, RETURN RECEIPT REQUESTED, addressed to:

Victor B. Maddox
Commercial Litigation Branch
Civil Division
Department of Justice
Washington, D.C. 20530

LEARA DENSON
Petitioner
July 26, 1985

In The

Supreme Court
of the United States

OCTOBER TERM, 1985

NO. 84-1663

Leara Denson, *Petitioner*

v.

Department of Health and Human Services
Respondent

PROOF OF SERVICE

I hereby certify that on this 28th day of August, 1985 I have served two copies of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT on counsel for the Respondent by enclosing copies thereof in an envelope, CERTIFIED MAIL, RETURN RECEIPT REQUESTED, addressed to:

Clerk
United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Victor B. Maddox
Commercial Litigation Branch
Civil Division
Department of Justice
Washington, D.C. 20530

LEARA DENSON
Petitioner
August 28, 1985

Supreme Court, U.S.
FILED
OCT 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-374

In the Supreme Court of the United States

OCTOBER TERM, 1985

LEARA DENSON, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-374

LEARA DENSON, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The judgment of the court of appeals in this civil case was entered on March 14, 1985 (Pet. App. 12), and a petition for rehearing was denied on April 29, 1985 (Pet. App. 13). Petitioner did not obtain an extension of the time within which to file a petition for a writ of certiorari, so the petition was required to be filed on or before Monday, July 29, 1985. The petition was filed on July 30, 1985. Although petitioner has certified (Pet. App. 17) that she served the petition by mail on July 26, 1985, she has not filed a notarized statement by a member of the Bar of this Court that would entitle her to invoke Rule 28.2 of the Rules of this Court. The petition is therefore untimely. The time limit provided in 28 U.S.C. 2101(c) is jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

OCTOBER 1985

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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85-374

Supreme Court, U.S.
FILED
OCT 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-374
NO. ~~84-1663~~

In The

Supreme Court of the United States

OCTOBER TERM, 1985

Leara Denson, *Petitioner*

v.

Department of Health and Human Services
Respondent

Petition for Writ of Certiorari to
the United States Court of Appeals
for the Federal Circuit

JURISDICTIONAL STATEMENT

SUPPLEMENTAL BRIEF CITING NEW CASES

LEARA DENSON
2571 Candler Road, Apt. B-1
Decatur, Georgia 30032
(404) 243-0527

12 pp

CONTENTS

Pursuant to Rule 16.6 of the Rules of the Supreme Court of the United States. The petitioner respectfully requests that the Court consider the findings in the two cases cited below, if the petition for Writ of Certiorari is granted.

1. Cleveland Board of Education v. Loudermill 84 L Ed 2d 494.

2. Special Counsel v. Charles O. Starrett, Jr., Paul Evans, Arlin R. Tueller (June 13, 1985 MSPB) Doc No. HQ12068310022.

In Cleveland Board of Education v. Loudermill 84 L. Ed 2d, 494 this Court held:

> An essential principle of due process is that deprivation of life, liberty, or property 'be proceded by notice and an opportunity for hearing appropriate to the nature of the case.

The nature of the petitioner's case was removal as a reprisal . Based on agency's objections, the presiding official refused to allow the petitioner to develope an affirmative defense of reprisal by refusing to allow any witnesses or evidence of the protected activities.

This Court also held in this case at pages 504 and 505:

> Dismissal for cause will often in-involve factual disputes...Even where the facts are clear, the appropriateness or nesessity of the discharge may not be, in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect.

The decisionmakers, Mrs. Aguilar and Mr. Frank, in the removal of the petitioner, were personally aware that the charges brought against her were not true. They had personal knowledge that the violations of the performance standard by the more experienced employees of the accounting section were more numerous and far more flagrant than the minor violations alleged against the petitioner.

Mrs. Aguilar and/or Mr. Frank were the reviewing and approving authority for the work of all the accounting clerks. They did not so much as call the errors of the other employees to their attention for corrections. But, they scrutinized every piece of work that the petitioner did for errors in efforts to justify the removal. This discriminatory enforcement of the performance standard only against the petitioner was called to the decision-makers attention prior to the removal.

They did not reasonably believe that the actions taken against the petitioner was appropriate. They knowingly and willingly brought untrue charges against her.

Justice Brennan, concurring in part and dissenting in part stated:

> As the Court also correctly noted, other cases 'will often involve factual disputes ante at 9, such as allegedly erroneous records or false accusations.... where there exist not just plausible arguments to be made, but also 'substantial disputes in testimonial evidence' due process may well require more than a simple opportunity to argue or deny.
>
> When factual disputes are involved, therefore, an employee may deserve a fair opportunity before discharge to produce contrary records or testimony.

Most of the allegations presented to the MSPB in the proposal to remove and the notice of removal are totally contradicted by the alleged substantial evidence submitted by the agency and the testimonial evidence by Mrs. Aguilar. The MSPB nor the Court of Appeals did not see these

contradictions and deceptions.

The petitioner was given notice that she was being detailed out of her position on July 28, 1982, two days prior to being given the proposal to remove. She maintained a desk and personal belongings in the accounting section. In preparing a response to the proposal, the petitioner went back into the accounting section and was looking at some of the records to try to submit contrary evidence. Mrs. Aguilar and Mr. Frank went into an outrage and had her escorted from the section by her supervisor while on detail.

Mr. Frank told her that she had no business there since she was no longer in the section. Any attempt made by the petitioner to support her defense was barred by the agency. The records that she requested under the MSPB discovery procedures were not provided until the morning of the hearing.

Justice Brennan again relied upon the finding of this Court that:

> [I]t is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'

The Merit Systems Protection Board's landmark decision for reprisal in the case of Special Counsel v. Charles O. Starrett, Jr., Paul Evans, Arlin R. Tueller (June 13, 1985 MSPB) Doc No. HQ12068310022, the MSPB followed the accepted rule held by the Supreme Court in Conley v. Gibson, 355 U.S. 41, 45 (1957) at page 18, para 1:

> In appraising the sufficiency of the complaint, we follow of course, the accepted rule that a complaint should not be dimissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

It is verifiable by the records that the petitioner fully met the performance standard of a general accounting clerk,

even though, she was required to perform at a higher level than her more experienced co-workers. Mrs Aguilar stated that she considered the petitioner fully trained in four months at TR 94 (6-7) and TR 144 (10). The other accounting clerks stated at the MSPB hearing that it took them from one to two years to fully learn the job.

The Board relied on "logical inference" of causal connections at page 9, para 3. The Board also held:

> For guidance in assessing penalties in these cases, the Board has adopted the same standards which it requires of an agency in an appellate jurisdiction case. The Board examines the record with a view to balancing the relevant factors which it discussed in Douglas v. Veterans Administration, 5 MSPB 313 (1981).

The petitioner's removal was for no reason than reprisal. The wrongful discharge of her was not an error in judgment, but was done with such malice that supervisors laughed in her face as they

set her up for removal. If the petitioner had been treated in a fair and equitable manner she would have been the last accounting clerk to be removed for performance.

Respectfully submitted,

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In The
Supreme Court
of the United States

October Term 1985

No. 85-374

Leara Denson, Petitioner

v.

Department of Health and Human Services
Respondent

PROOF OF SERVICE

I hereby certify that on this ~~11~~ 15th day of October, 1985 I have served three copies of the foregoing SUPPLEMENTAL BRIEF CITING NEW CASES to the parties addressed below by enclosing copies thereof in an envelope, via CERTIFIED MAIL, RETURN RECEIPT REQUESTED:

Clerk
United States Court of
Appeals for the Federal
Circuit
717 Madison Place
Wash., D.C. 20439

Charles Fried
Acting Solicitor
General
Dept. of Justice
Wash., D.C. 20530

Leara Denson, Petitioner
October ~~11~~ 15, 1985